UNITED STATES
v.
RICHARD C. REYNDERS, AND
CAROL J. REYNDERS

IBLA 76-558 Decided July 30, 1976

Appeal from decision of Administrative Law Judge Dean F. Ratzman declaring placer mining claims null and void. OR-10780.

Affirmed.

1. Mining Claims: Discovery: Generally

A discovery of a valuable mineral deposit has been made where minerals have been found and the evidence is of such a character that a person of ordinary prudence would be justified in the further expenditure of his labor and means with a reasonable prospect of success in developing a valuable mine.

2. Mining Claims: Discovery: Generally

A discovery of a valuable mineral deposit may be lost in many ways including, but not limited to, forgetting the situs of the deposit, exhaustion of the deposit, or loss of a market for the mineral.

3. Administrative Procedure: Burden of Proof -- Mining Claims: Contests

When the Government contests a mining claim on a charge of no discovery, it bears the burden of going forward with sufficient evidence to establish a prima facie case; the burden then shifts to the claimant to show by a preponderance of the evidence that a discovery has been made.

4. Administrative Procedure: Burden of Proof -- Mining Claims: Contests

Where a Government mineral examiner testifies that he has examined a claim and found the mineral values insufficient to support a finding of discovery, a prima facie case of invalidity has been established. Government mineral examiners are not required to perform discovery work for claimants or to explore beyond a claimant's workings.

5. Mining Claims: Hearings -- Rules of Practice: Evidence

Evidence tendered on appeal from an adverse decision in a mining claim contest cannot be considered in the absence of a compelling showing that it could not be tendered at the hearing, and even then such evidence may only be considered for the purpose of determining whether a rehearing is warranted.

6. Mining Claims: Determination of Validity -- Mining Claims: Discovery: Generally

The prudent man test cannot be satisfied by a claimant's assertion that he is willing to accept a meager income from the claim in order to add to retirement income. Determination of the validity of a mining claim can rest only on objective criteria, not subjective considerations.

APPEARANCES: Richard C. Reynders and Carol J. Reynders, pro se.

OPINION BY ADMINISTRATIVE JUDGE STUEBING

Richard C. Reynders and Carol J. Reynders appeal from the August 11, 1975, decision of Administrative Law Judge Dean F. Ratzman, declaring their mining claims null and void. The claims, known as the Bour Group and Hanson Ditch Placer Mining Claims, are located in section 10, T. 39 S., R. 9 W., Willamette

Meridian, Josephine County, Oregon. The contest proceedings were initiated at the request of the Forest Service; the complaint charged that no discovery of a valuable mineral deposit had been made on the claims. Appellants denied the charge.

[1] The Department of the Interior defined the phrase "discovery of a valuable mineral deposit" within the context of the general mining law, 30 U.S.C. § 22 et seq. (1970), in an early case, Castle v. Womble, 19 L.D. 455, 457 (1894):

> * * * [W]here minerals have been found and the evidence is of such a character that a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success in developing a valuable mine, the requirements of the statute have been met.

That definition, known as the "prudent man test," has received the continuing approval of the Supreme Court. Chrisman v. Miller, 197 U.S. 313, 322 (1905); Cameron v. United States, 252 U.S. 450, 459 (1920); Best v. Humboldt Placer Mining Co., 371 U.S. 334 (1963). Over the years since the promulgation of the prudent man test the Department has refined the law of discovery to include what has become known as the "marketability test," that is, the mineral deposit must be perceived by a prudent man as one that is susceptible to extraction, removal and marketing at a reasonable profit. The Supreme Court characterized the marketability requirement as a "logical complement" to the prudent man test. United States v. Coleman, 390 U.S. 599, 603 (1968). While the Department does not require a "sure thing," United States v. Kosanke, 3 IBLA 189, 217, 78 I.D. 285, 298 (1971), vacated on other grounds, 12 IBLA 282, 80 I.D. 538 (1973), the nucleus of value which sustains a discovery must be such that with actual mining operations under prudent management a profitable venture may reasonably be expected to result. Converse v. Udall, 399 F.2d 616, 623 (9th Cir. 1968), cert. denied, 393 U.S. 1025 (1969).

[2] A discovery, once made, may be "lost" through the occurrence of any one of a number of events, including simply losing track of the situs of the deposit, exhaustion of the deposit, or loss of the market and, thus, the value of the deposit. Best v. Humboldt Placer Mining Co., 371 U.S. 334, 336 (1963), citing with approval, United States v. Logomarcini, 60 I.D. 371, 373 (1949); United States v. Houston, 66 I.D. 161, 165 (1959); United States v. Johnson, 16 IBLA 234, 237-38 (1974); United States v. Silverton Mining and Milling Co., 1 IBLA 15, 18 (1970) aff'd sub nom. Multiple

Use, Inc. v. Morton, 353 F. Supp. 184, 193 (D. Ariz. 1972), aff'd 504 F.2d 448 (9th Cir. 1974).

[3, 4] When the Government contests a mining claim on a charge of no discovery, it bears the burden of going forward with sufficient evidence to establish a prima facie case; the burden then shifts to the claimant to show by a preponderance of the evidence that a discovery has been made. Foster v. Seaton, 271 F.2d 836, 838 (D.C. Cir. 1959); United States v. Springer, 491 F.2d 239, 242 (9th Cir.) cert. denied, 419 U.S. 834 (1974); United States v. Zweifel, 508 F.2d 1150 (10th Cir. 1975), cert. denied, 423 U.S. 829 (1976). The Government has established a prima facie case when a mineral examiner testifies that he has examined a claim and found the mineral values insufficient to support a finding of discovery. United States v. Bechthold, 25 IBLA 77 (1976); United States v. Blomquist, 7 IBLA 351 (1972). It is true that the mineral examiner's conclusion must be based on reliable, probative evidence. United States v. Winters, 2 IBLA 329, 335, 78 I.D. 193, 195 (1971). But Government mineral examiners are not required to perform discovery work, to explore or sample beyond a claimant's workings, or to conduct drilling programs for the benefit of a claimant. Henault Mining Co. v. Tysk, 419 F.2d 766 (9th Cir. 1969), cert. denied, 398 U.S. 950 (1970). United States v. Grigg, 8 IBLA 331, 343, 79 I.D. 682, 688 (1972).

The Government's mineral examiner testified that the claims are located in an area which was once very productive gold country (Tr. 9). The origin of claims in this proceeding could probably be traced back to before the turn of the century (Tr. 10). However, the mineral examiner also testified that the gold deposits on most of the claims have been exhausted (Tr. 13, 23). Apparently, the early miners have mined all material that was fairly accessible, leaving only those deposits which are difficult and costly to work (Tr. 14).

The mineral examiner took two samples from the spots that seemed most likely to produce gold (Tr. 15). Those samples contained very little gold (Tr. 17). The mineral examiner concluded that the deposits on the claims could not be mined economically (Tr. 18, 20, 23).

The Reynders were represented at the hearing by their son, Edward Reynders. He conceded that there was no discovery and that the Reynders' principal interest was in retaining the cabin on the claims.

> Q. Well, I'll be the first to admit that, like you say, no reasonable man would go in there with the hopes of, you know, making a profit off of moving that dirt around, because at today's prices and the way things are, there's no way you can go in there and mine it and come out, you know. And, there is gold up there, but probably not enough to, you know, substantiate investing a whole bunch of money, like you say, you'd never come out. I know my Dad's put a lot of work in it there on the cabin and the claim and the road -- and that sluice box he's got down there and all that pipe he strung up and down that hill.
>
> A. [Mineral examiner] Well, that's a lot of work.
>
> Q. Yes, and he rebuilt the roof in the cabin because it was starting to rot; put a new tarpaper down and he's got a lot of money and hard labor invested up there. I know that he'd hate to lose it or he probably really doesn't care much about the mining aspect of it anymore, because it isn't, you know, like I say, it's not worth it.

(Tr. 27).

In spite of those concessions, appellants' argue that there is sufficient gold on the claims to support some mining activity. Moreover, appellants state that they are willing to accept relatively meager returns as that would be better than social security.

[5] In support of their assertions that there is enough gold on these claims to support a modest mining operation, appellants have submitted a map showing some channels where, appellants assert, gold can be found. It is not the function of this Board to receive evidence tendered on appeal in the absence of a compelling showing that the evidence could not be produced at the hearing, and even then such evidence may only be considered for the purpose of deciding whether a further hearing is warranted. United States v. Hallenbeck, 21 IBLA 296, 302 (1975). Due process requires notice and an opportunity to be heard. United States v. O'Leary, 63 I.D. 341 (1956). Appellants were given that opportunity. In the absence of a compelling reason to the contrary, due process does not require a second hearing. United

States v. MacIver, 20 IBLA 352, 359 (1975). 1/ No such reason has been offered in this instance.

[6] The fact that appellants are willing to accept a return which is relatively meager does not satisfy the prudent man test, as a prudent man would not invest his labor and means if his only expectations were meager profits at best. United States v. Heard, 18 IBLA 43 (1974); United States v. King, 15 IBLA 210 (1974), aff'd, King v. United States, Civ. No. 74-151 (D. Ariz., filed July 10, 1975), appeal filed with Court of Appeals, November 9, 1975. The prudent man test is objective, and subjective considerations, such as willingness to work for little or no return, simply have no place in the calculus of prudence. United States v. Arcand, 23 IBLA 226 (1976); United States v. Alexander, 17 IBLA 421, 434 (1974). 2/

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

Edward W. Stuebing
Administrative Judge

We concur:

Douglas E. Henriques
Administrative Judge

Anne Poindexter Lewis
Administrative Judge

1/ Even if we were to consider the evidence, it consists of unsupported allegations that gold exists in mineable quantities on the claims. There is nothing that would suggest that the allegations are cogent.
2/ Appeal pending, Alexander v. United States, Civ. No. 75-465 (D. Ore.).